
RESERVATION IN PROMOTION: MERIT OR SOCIAL JUSTICE

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Ever since 77th and 85th constitutional amendments provided reservation in promotion with consequential seniority by introducing Art 16(4A) to the Indian constitution, there have been acrimonious legal debates, leading to confusion in judicial decision-making. Two issues are common to all the debates; firstly, whether there should be reservation in promotion and secondly if reservation in promotion is to be provided, then how to justify it. The second issue refers to procedural aspects and is easier to deliberate; hence it is discussed first in the following paragraphs.

One school of thought claims the reservation in promotion should be based on the ‘adequacy of representation test. The adequacy or inadequacy of representation of the backward classes, *Indra Sawhney* held, was a matter of subjective satisfaction of the state.¹ How is this subjective satisfaction to be arrived at? *Barium Chemicals v Company Law Board* says subjective satisfaction of the state must be preceded by circumstances relevant for making inferences, and they must lead to definite conclusions.² Per this principle, the State can subjectively satisfy itself regarding the adequacy of representation by taking certain steps like, as *Indra Sawhney* mentioned, interpretation of data the State already possesses or collection of quantifiable data through some mechanism like commissions. The propositional objective is to determine whether people from backward classes have adequate representation in class or classes of service under the state. There are at least two inherent issues in this proposition. At a substantive level, how do we decide the level of adequacy? Black’s Law Dictionary defines adequate as “sufficient; commensurate; equal to what is required; suitable to the case or occasion; satisfactory.”³ Of the above meanings, ‘sufficient’ is beneficial for the present discussion because many constitutional bench decisions have understood ‘adequacy’ on the parameter of ‘sufficiency’.

¹ *Indra Sawhney v. Union of India* 1992 supp (3) SCC 217.

² *The Barium Chemicals Ltd. & ANR Vs. The Company Law Board & Ors* [1966] INSC 116 (4 May 1966)

³ Brian A. Garner, editor in chief. *Black's Law Dictionary*. St. Paul, MN :Thomson Reuters, 2014.

General Manager, Southern Railway, Personnel Officer (Reservation), Southern Railway v Rangachari, understood adequacy as within the permissible and legitimate limits.⁴ Adequacy is an action sufficient enough to strike a balance between the claims of backward class employees and other employees with efficiency in administration. *Indra Sawhney* very authoritatively held that adequate representation did not mean proportionate representation. Recently, *Dr Jaishri Laxmanrao Patil v The Chief Minister & Ors.* (“Maratha Reservation”) a constitution bench of the Supreme Court was faced with the question of whether the Maratha caste is adequately represented in public services under the state of Maharashtra.⁵ The court went on to minute details of the Gaikwad commission and found that Maratha caste people occupy 33.23%, 29.03%, 37.06% and 36.53% in Grade A, B, C, D posts in public service under the State of Maharashtra, which was adequate and satisfactory representation.⁶

Maratha Reservation case provides an important methodology to calculate the adequacy of representation. The constitution bench has taken service as a whole for the computation of the representation of the Maratha caste. For example, the percentage is calculated by taking all Grade A services together. It is pertinent to mention Art 16(4A) mentions the phrase “class or classes” of service. A persistent doubt in the legal circle is whether ‘class or classes’ means service or cadre. The previous judgments have not helped much to remove this doubt. For example, *R.K. Sabharwal* has directed to take entire cadre strength to compute the percentage of reservation⁷, and *Jarnail Singh* directs to consider reservation in terms of cadres⁸. *B.K. Pavitra* held that quantifiable data is required to determine the inadequacy of representation in services under the state.⁹ So, what is the correct position? “Class or Classes may mean the services such as Grade A, B, C, D etc., or cadres, which are included in each service category. The two exercises that have taken steps to quantify data (the Ratnaprabha committee and the Gaikwad Commission) have taken cadres within a service to determine representation's adequacy. For example, the Gaikwad commission categorized the various services cadre-wise and computed the extent of representation. It is beneficial to refer to the majority opinion in *Rangachari*, where the court held that

⁴ *General Manager, Southern Railway, Personnel Officer (Reservation), Southern Railway v Rangachari*, AIR 1962 SC 36

⁵ *Dr Jaishri Laxmanrao Patil v The Chief Minister & Ors.* 2021 SCC OnLine SC 362

⁶ *Id.*

⁷ *R. K. Sabharwal And Ors vs State Of Punjab And Ors* 1995 AIR 1371, 1995 SCC (2) 745.

⁸ *Jarnail Singh v. Lachhmi Narain Gupta*, 2018 SCC OnLine SC 1641

⁹ *B K Pavitra v Union of India*, (2017) 4 SCC 620

[B]oth "appointments" and "posts" to which the operative part of Art. 16(4) refers and in respect of which the power to make reservation has been conferred on the State must necessarily be appointments and posts in the service. It would be illogical and unreasonable to assume that for making the representation adequate in the services under the State, a power should 'be given to the State to reserve posts outside the cadre of services. If the word "posts" means ex-cadre posts, reservation of such posts cannot possibly cure the imbalance which, according to the State, is disclosed in the representation in services under it. Therefore, in our opinion, the key clause of Art. 16(4), which prescribes a condition precedent for invoking the power conferred by it unambiguously, indicates that the word "posts" cannot mean ex-cadre posts in the context.¹⁰

When the court said services under the state within the precinct of Art 16(4) might not include ex-cadre posts, it can be safely said while providing reservations, the cadres within a service need to be taken into account. This understanding is consistent with the exercise conducted by the Gaikwad commission and the Maratha Reservation judgment. The argument that the computing reservation based on cadres will be a humongous task loses most of its credence in the age of big data analytics. When it is fairly established that adequacy of representation is to be computed within the cadres of service under the state, the question arises whether computing by way of percentage is sufficient to strike the balance *Rangachari* provides. To answer this question, one needs to revert to the first issue, already pointed out, the issue of substantive character: Why reservation in promotion?

Rangachari was first faced with this question thirty years before Art 16(4A) was introduced. It is considered reservation in Art 16(4) and reservation in promotion. The court held power under Art 16(4) can be exercised where the state thinks that certain backward classes are not adequately represented. By giving reservation, the inadequacy is bridged, and the representation is made adequate. This is a simple mathematical linear equation of computing the extent of inadequacy in representation and overcoming it by reservation. It means the state, through some mechanism, identifies a particular backward class with a certain percentage of representation which, in the opinion of the state, is not sufficient. Hence, it decides to give reservation to the backward class so that the representation increases to a higher percentage. Computing by percentage is the most straightforward way of calculating inadequacy. A school

¹⁰ *Rangachari* (n, 4)

of thought says adequacy of representation should be calculated proportionate to the population.

Notwithstanding the fact that *Indra Sawhney* has specifically rejected this line of logic, one can say in today's time, not all members of the backward class seek government service. Government Service is not the only media for socio-economic uplift. People across socio-economic backgrounds are seeking opportunities in the private sector, especially in IT and ITES firms. New age avenues like startups in the media sector, education sector and non-traditional business enterprises like blogging, social media influencers etc., have seen a craze among the youth. Even though Government Services are still the preferred option, it is not the only one for climbing the socio-economic hierarchy, as it was four decades back. Hence, proportionate to the population cannot be a valid mechanism.

The logic behind reservation in a promotion or, for that matter, any reservation is that once inadequacy is bridged, there will not be any requirement for reservation. This logic is echoed in *Nagaraj*, where the court held that service jurisprudence could not be given the exalted status of constitutional provisions and the state is not constitutionally bound to make a reservation in services under the state.¹¹ The combing reading of the logic of *Rangachari* and *Nagaraj* shows there will be an end date to reservation (or reservation in promotion). The state needs to subjectively satisfy them regarding the continuance of it. Once in the opinion of the state, the backward classes have sufficient representation in Government Services, it is free to discontinue reservation.

There is a substantive difference between recruitment and promotion. Whereas reservation in recruitment may be a medium to ensure the representation of backward classes in public employment, reservation in promotion must be tested in the anvil of administrative efficiency. It is pertinent to refer to Justice Jeevan Reddy in *Indra Swaheny*, wherein he held there might be specific posts at the top where the reservation was impermissible altogether. Because of this logic, the court in *Jarnail Singh* left the question of reservation in promotion to the State. After *Jarnail Singh*, the constitutional validity of Art 16 (4A) is circumscribed with "maintenance of efficiency in administration" as per Art 335 of the constitution.

But one must not confuse efficiency with merit. The concept of merit cannot be the sole criteria for promotion. Michael Sander rightly remarks, 'the concept of merit has been used to privilege

¹¹ Nagaraj v. Union of India, (2006) 8 SCC 212

the privileged and to deny benefits to the underprivileged.’¹² Hence, as per him, merit as a concept is essentially flawed. Essentializing merit is a way of creating different forms of social hierarchies based on dissimilarity in natural endowments. Meritocracy brings an acrimonious hiatus between the winner and the loser, adversely affecting the common good. The administration is not a meritocratic device but a device for dispensing the common good. The debate of whether reservation or not in matters of promotion has resulted in perilous fault lines among the service holders. This fault line thrives on the merit v social justice debate. But it is high time one manoeuvres the dark waters of such a debate toward realizing the common good. Seniority rule, *inter-se* seniority rule or the catch-up rules are figments of the imagination – either justifying merit or the social justice paradigm. It is time promotion in public service be delinked from the scam of seniority and provide a level playing field for every member to compete for a promotional post. This competition at every level will not be a meritocratic competition that can draw its root from the initial appointment, qualification or merit; rather, it is a measurement of job expertise at each level. Unlike natural talent, expertise is a skill that can be learned. Post recruitment, pre-induction training, job training, hands-on training, refresher training etc., create a situation where the natural endowments, privileged background etc., don’t matter. What matters is the common good- the efficiency of the bureaucratic setup. And linking promotion with efficiency is the natural concomitance in achieving a shared feeling of the common good.

Achieving a shared feeling of the common good is even more important in a caste-ridden society like India. Caste-based discriminations are pervasive in all wakes of life. Reservation will not be of much benefit in debunking the caste differences. It is not uncommon to find in classroom setups students belonging to SC and ST communities are forced to feel guilty, by their peer group, for availing the rights given by the constitution. Sometimes, social media groups were filled with critical messages about a civil service examination topper because she had availed her constitutional right of reservation in the preliminary examination despite belonging to a well-to-do family. But the social media critics failed to accept that she had scored the highest mark in the mains examination and the interview and stood All India Rank 1 on her merit! The preliminary examination is a qualifying examination with no bearing on the final ranking.

¹² Sandel, Michael J. The Tyranny of Merit. Allen Lane, 2020.

So, reservation in promotion should be delinked from either paradigm of reservation or meritocracy. The anchoring criteria should be efficiency and a shared feeling of common good so that maintenance and upkeep of the administrative system are achieved.